No. 20-CV-746

DISTRICT OF COLUMBIA COURT OF APPEALS

OVERDRIVE, INC.,
Petitioner-Appellant,

v.

OPEN EBOOK FORUM,
Respondent-Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION, CIVIL ACTION NO. 2016 CA 007768 B

REPLY BRIEF OF PETITIONER-APPELLANT OVERDRIVE, INC.

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"***App.____***" .....Citation to the Appendix

"***EPUB***"..... The widely used, open source e-book file format developed by IDPF's Members, including OverDrive

"***Fact ¶ __***"..... Paragraph in Petitioner OverDrive, Inc.'s Feb. 8, 2019 Statement of Undisputed Material Facts in Support of Motion for Summary Judgment (App.726-68)

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I. INTRODUCTION

The Superior Court's decisions should be reversed, and IDPF's Brief provides no basis to conclude otherwise. IDPF makes no effort to explain the material misrepresentations it made both before and after the procedurally and substantively flawed 2016 vote approving the MIT/W3C Transaction. Indeed, OverDrive brought this action in the first place because IDPF was not forthcoming to its members about that Transaction. Instead, IDPF tries to recast its misrepresentations as "disagreements" about "legal interpretations." But facts are stubborn things. And the actual facts about the Transaction—not IDPF's carefully curated distortions—should be presented to the members in a new vote.

But another erroneous jurisdictional ruling is causing the truth to be withheld from IDPF's members. Repeating the error in the Superior Court's faulty 2016 decision, IDPF argues that the "power" to hear challenges to IDPF's board is limited to enforcement of the Articles and Bylaws. Nothing in Section 29-104.22, however, limits the court's power to bare "enforcement" of a nonprofit's articles or bylaws without at least considering the fairness of their application given the facts and circumstances of the case. Restricting its review to "enforcement" is identical to the Superior Court's prior determination that it lacked "jurisdiction;" a holding that was reversed by this Court.

But even if Section 29-401.22(c) somehow foreclosed OverDrive's right to judicial review under subsection (a) (and it does not), OverDrive's Amended Petition invoked several other jurisdictional provisions, including the extensive grant of jurisdiction in Section 11-921. The Superior Court has broad equitable powers to fashion appropriate relief, including in disputes involving nonprofit corporations. Crucially, "the Superior Court is no longer a court of *limited* jurisdiction, but a court of general jurisdiction with the power to adjudicate any civil action at law or in equity involving local law." *Andrade v. Jackson*, 401 A.2d 990, 992 (D.C. 1979) (emphasis in original). A single statute that purports to limit the Superior Court's review to mere "enforcement" does not also limit its general jurisdiction. Again, this issue was also already decided as part of the first appeal in this case.

Demonstrating the futility of its holding, the Superior Court did not even follow its self-imposed "enforcement" limitation. The court went on to determine that MIT/W3C is a "substantially similar" organization to IDPF. (That is a requirement of IDPF's Articles.) That ruling, while incorrect, demonstrates the Superior Court's willingness to pierce the substance of nonprofit action to determine compliance with IDPF's Articles.

Equally important, and like its previous ruling in this case, this Court's decision will guide future courts in an undeveloped area of the Uniform Nonprofit Corporation Act (from which Section 29-401.22 was taken). Consistent with the

spirit of that Act, the Superior Court's jurisdiction, and the supervisory authority involved, this Court should again uphold the rights of nonprofit members to seek judicial review of illegitimate board actions.

Had the Superior Court considered IDPF's numerous misrepresentations—which IDPF hopes we ignore—it would have found that the board made it impossible for OverDrive to utilize the Bylaws' futile rescission provision. That alone justified summary judgment for OverDrive. Any other result would greatly erode, if not eliminate, nonprofit members' statutory right to seek judicial review of inequitable corporate action, which, in this case, was fundamental to IDPF's very existence.

Accordingly, OverDrive respectfully requests that this Court reverse the Superior Court and instruct it to enter summary judgment for OverDrive, including ordering a new vote on the MIT/W3C Transaction.

II. THE UNDISPUTED FACTS DEMONSTRATE THAT IDPF'S MISREPRESENTATIONS, THE BOARD'S SELF-DEALING AND CONFLICTS, AND THE RUSHED VOTE TO DESTROY IDPF BREACHED ALL DUTIES TO PROTECT MEMBER INTERESTS UNDER D.C. NON-PROFIT LAW

In its 50-page Brief, IDPF devoted only six pages to defending its material misrepresentations about the MIT/W3C Transaction, and what it says cannot be squared with the facts. IDPF argues that its misrepresentations were only "legal *interpretation*[s] on which [OverDrive] and IDPF disagree." (Appellee's Br.

at 48 (emphasis in original).) But as the undisputed facts show, IDPF willfully (or carelessly) misled OverDrive and IDPF's membership to force a transaction that was nothing like what was promised. Any of those misrepresentations alone require reversal, and together, they require summary judgment for OverDrive.

A. IDPF Cannot Transfer EPUB Or Dissolve As Represented

IDPF has no response to its misrepresentations of its ownership of, and ability to transfer, EPUB to MIT/W3C. There is no dispute that IDPF represented that it was transferring EPUB to MIT/W3C and that its representation was false. (Fact ¶¶ 148, 163, 177.) IDPF responds that OverDrive's copyright arguments are "misplaced" because "OverDrive did not in the federal court seek a declaration regarding the 'transfer' of IDPF's rights to MIT/W3C." (Appellee's Br. at 47–48.) This is incorrect, and the Federal Court rejected this same argument. *See OverDrive, Inc. v. Open eBook Forum*, No. 1:17-CV-165, 2019 WL 3530402, at *2 (N.D. Ohio May 16, 2019) (holding that OverDrive "asserts that as part-owner of the copyrighted material (EPUB), Defendant could not legally transfer the EPUB to MIT without [OverDrive's] consent") (internal quotation omitted).

More important, the United States Court of Appeals for the Sixth Circuit recognized that "when (and if) [IDPF] transfers its intellectual property" IDPF will face another copyright infringement suit. *See OverDrive Inc. v. Open E-Book Forum*, 986 F.3d 954, 958 (6th Cir. 2021). There is no dispute that the only reason

why IDPF changed the Transaction after the member vote in 2016 is because it knows it cannot transfer EPUB or dissolve without facing further litigation. IDPF also knows that the Transaction included a transfer of EPUB to MIT/W3C. But IDPF's recklessness means that IDPF will have to continue to exist (without members or a source of funding) to hold EPUB indefinitely. The Plan's copyright and intellectual property disclosures were false and misleading, and the transfer of EPUB to MIT/W3C may never be completed. IDPF's decision to ignore this problem is an independent (and unrebutted) basis to reverse and to grant summary judgment for OverDrive.

IDPF also does not explain how its statement that IDPF "members d[id] not have an ownership interest in the organization's assets," including in EPUB, was true when made to the members. (Fact ¶ 146.) Instead, under federal law and IDPF's intellectual property policy, all "copyrights or other intellectual property owned or created by any Member shall remain the property of that Member." (*Id.* ¶ 147.) That misrepresentation effected the central purpose of the Transaction—purportedly to transfer EPUB to MIT/W3C—and misled the members about what they owned and were approving.

IDPF cannot explain how its representation that "transferring IDPF's assets, including EPUB, to MIT" was the "best" way to serve the "common business interests" of IDPF Members and to improve the "industry of digital publishing," was

true. (Fact ¶ 148.) IDPF gave the false impression that the members could not assert ownership over their contributions to EPUB. But in fact, IDPF had no power to transfer EPUB to MIT/W3C unilaterally, whether or not the board thought it was in IDPF's "best" interests, particularly given that material facts were withheld or misrepresented during the voting process.

The inability to transfer EPUB and dissolve are not "legal interpretations," they are misrepresentations on which the Transaction was sold to IDPF's members and for which IDPF has no real response.

B. IDPF's Refusal To Provide Contact Information Was Inexcusable

IDPF cannot explain its refusal to allow OverDrive to contact the members. Even under the Superior Court's unnecessarily narrow reading of its statutory "power" (*see infra* Section III), IDPF's undisputed interference made it impossible for OverDrive to invoke the internal "remedy."

It is undisputed that OverDrive sought contact information for IDPF's "primary representatives." It is also undisputed that IDPF refused to provide it. Throughout the course of this litigation, IDPF has offered differing justifications for this refusal as it found convenient, but its principal reason is that OverDrive is not "legally entitled" to that information. In support of that position, IDPF misinterpreted the Superior Court's January 2017 Order quoted in its Brief. (Appellee's Br. at 45.) The court correctly noted that the Code "allows organizations

to govern themselves according to their own preferences, however old-fashioned or unsophisticated by contemporary business standards those preferences might be." (*Id.* (quoting 1/6/2017 Order, *rev'd*, *OverDrive, Inc. v. The Open eBook Forum*, Case No. 17-CV-101 (D.C. Feb. 23, 2018).) But IDPF overlooks not only this Court's reversal of that opinion but also that its Bylaws—including the provisions that it argues are a mandatory substitute for judicial review—expressly envision or even require e-mail communication and that IDPF communicates exclusively via e-mail.

Far from "old-fashioned or unsophisticated," IDPF's practices kept pace with the times. In fact, IDPF announced the vote on the Transaction via e-mail to the "Primary Representatives of [the] Member organizations of the International Digital Publishing Forum (IDPF)." (Opp'n Fact ¶ 16 (indication added).) IDPF argues that OverDrive should not be able to use the same method to communicate about the most important transaction in IDPF's long history. That argument is not supported by IDPF's Articles or the facts of this case.

IDPF's Articles expressly permit communication to and from members in seven different areas. In Article II, Section 11, notice of member meetings "shall be given . . . by . . . e-mail" and that notice is "deemed given" when "delivered by e-mail." (Opp'n Fact ¶ 17.) Article III, Section 7, contains an identical provision for meetings of IDPF's board, and includes a section allowing waivers of notice by e-mail (*Id.* ¶ 18.) Article III, Section 10, even permits an IDPF director to resign by

e-mail. (*Id.* ¶ 19.) The consistent use of e-mail is also how IDPF's board communicates with one another (and with counsel) to this day. (*See, e.g.*, *id.* ¶ 20.)

Most important, the provision on which IDPF bases its misdirected "statutory power" argument under Section 29-401.22(c) expressly contemplates e-mail communications with IDPF. Article III, Section 1 provides that a petition to trigger a vote on rescission "may be sent by an identical e-mail message sent separately to [IDPF's] Secretary by each of the petitioners." (Opp'n Fact ¶ 21.) IDPF has decided "to govern [itself] according to [its] own preferences," as the Superior Court recognized, and that preference is to adopt or even require communication by e-mail. IDPF's obstruction had nothing to do with a choice of self-government. IDPF did not want OverDrive contacting the members and challenging the decision to merge with MIT/W3C. (Fact ¶ 103.)

IDPF also suggests that OverDrive could somehow be at fault because OverDrive did not unilaterally uncover the names and e-mail addresses of the nearly 300 IDPF representatives. (*See* Appellee's Br. at 46.) As IDPF well knew, it would have been impossible to contact the members during the limited voting period (or even in the months before the vote was suddenly announced). IDPF's website lists the names, locations, and top-level websites of 292 organizations IDPF represented as its "members." (Fact ¶¶ 104–105.) No other contact information is provided.

Even with unlimited time, contacting the primary representatives for those entities based on the information IDPF disclosed on its website would have been impossible.

To make an effective communication even more difficult, only a fraction of the 292 IDPF "members" listed on the website were eligible to vote on the Transaction. During the preliminary injunction hearing in the Superior Court, IDPF testified that it had approximately 134 voting members. Not only did OverDrive not know who the primary representatives were, it did not know (and could not unless IDPF told it) which members could vote. Consequently, in order to have been effective, a message from OverDrive not only had to find the primary representatives but also had to find an unknown subset of IDPF voting members in good standing.

Far from a "red herring" (Appellee's Br. at 43), IDPF's decision to withhold contact information for its members suppressed discussion about the Transaction. IDPF regularly used or required e-mail communication with its board or among the members, but it did not allow OverDrive the same access to make use of the Bylaws' rescission provision. Like all the steps it took in presenting the Transaction, IDPF wanted to make sure that anyone who opposed a merger with MIT/W3C, or who had an alternative transaction, would be prevented from ever challenging the board's decision. IDPF's inconsistent position on e-mail communication is merely an attempt to distract the Court from its improper and unfair conduct in pushing through the Transaction.

C. Disclosure Does Not Excuse Mr. McCoy's Conflict Of Interest

IDPF's reliance on Section 29-406.70 as a cure for Mr. McCoy's conflict of interest is ineffective. (*See* Appellee's Br. at 44–45.) The Plan's partial disclosure of Mr. McCoy's conflict of interest does not exempt it from judicial scrutiny. IDPF failed to disclose that the board overlooked concerns about MIT/W3C and didn't adequately supervise Mr. McCoy.

First, Mr. McCoy's conflict is relevant to show that the board ignored or suppressed obvious problems with the Transaction. For example, while Mr. McCoy was negotiating the Transaction on IDPF's behalf he wrote to the board that "it [was] a bit scary to have faith particularly in an organization [MIT/W3C] *in which we presently don't have full confidence*." (Fact ¶ 121 (emphasis added).) Despite the lack of confidence, IDPF and Mr. McCoy pressed on undeterred.

Second, Mr. McCoy's guaranteed position at MIT/W3C enabled the board to avoid questions about its negligent supervision of him and IDPF. Even though the parties strongly disagree on the reasons for it, it is undisputed that IDPF had financial difficulties. OverDrive contends that, since his tenure began, Mr. McCoy paid little attention to the day-to-day operations of IDPF, including critical duties such as collecting membership dues and expanding the member base. (Am. Pet. ¶ 65.) Marketing Mr. McCoy's role at MIT/W3C as empowering him "to oversee W3C's publishing activities as its W3C 'champion' to accelerate coordination [and] ensure

that our community's interests are strongly represented" allowed the board to dodge questions about the origins of IDPF's financial troubles. (Fact ¶ 178.) The position at MIT/W3C allowed IDPF to turn Mr. McCoy from a liability into an asset.

At the very least, the Superior Court's finding that there were "lingering question[s]" about Mr. McCoy's conflicts of interest precluded summary judgment for IDPF. (Fact ¶ 66.) But in light of the Transaction's many other red flags, summary judgment for OverDrive is the only equitable result.

The genuine issues of material fact surrounding each of these misrepresentations, at a minimum, precluded summary judgment for IDPF. But based on the narrow relief OverDrive seeks, any one misrepresentation was enough to justify summary judgment for OverDrive.

III. THIS COURT HAS REJECTED IDPF'S BYLAW ARGUMENT

In the First OverDrive Appeal, the Court rejected IDPF's argument that D.C. Code Section 29-401.22(c) limits the Superior Court's statutory power to hear and determine the validity of IDPF's actions under Section 29-401.22(a). *See OverDrive, Inc. v. The Open eBook Forum*, Case No. 17-CV-101, at 2. There is no reason to revisit that ruling. Yet, IDPF continues to argue, and the Superior Court continues to accept, that "the trial court's . . . statutory power to overrule the organization's Board and members is limited to enforcement . . . of the Articles and

Bylaws." (Appellee's Br. at 32.) IDPF offers no reason to revisit this decision, and the Court should again reject IDPF's interpretation of D.C. Code Section 29-401.22.

Before this Court, IDPF unsuccessfully "argued that what it understood to be a jurisdictional grant under D.C. Code § 29-401.22(a) . . . , was limited by D.C. Code § 29-401.2(c) . . . ." *OverDrive, Inc.*, Case No. 17-CV-101, at 2. "IDPF additionally argued that its bylaws contained a 'means of resolving a challenge to a corporate action' within the meaning of subsection (c), thereby depriving the Superior Court of jurisdiction." *Id.* IDPF repeats the same arguments here, with a slight immaterial modification.

This Court was "persuaded that D.C. Code § 29-401.22 should *not* be read as a jurisdiction-stripping statute," even though "[s]ubsection (a) seems to broadly define a cause of action which is circumscribed by section (c)." *Id*. "[T]he fact that 'Congress has retained exclusive legislative authority to define the jurisdiction of the District of Columbia courts,' . . . weighs heavily against treating section 29-401.22 as a jurisdictional statute." (*Id*. at 2-3 (alterations in original omitted) (quoting *Mathis v. D.C. Hous. Auth*., 124 A.3d 1089, 1100 n.20 (D.C. 2015)).) "Accordingly, [this Court] conclude[d] that the trial court has jurisdiction pursuant to D.C. Code § 11-921 to hear this case." *Id*. at 3.

Conceding, as it must, that the Superior Court had jurisdiction, IDPF now refers to the Superior Court's deference to its Bylaws as "an *exercise* of jurisdiction."

(Appellee's Br. at 32 (emphasis in original).) But the Superior Court essentially reissued its defective jurisdictional decision under another name; instead of saying it lacks "jurisdiction," it now says its power is limited to "enforcement." There is no difference between lack of jurisdiction and limiting the power of the Superior Court. By limiting its review to "enforcement" of IDPF's Bylaws, particularly without considering IDPF's misrepresentations and efforts to prevent OverDrive from invoking the Bylaws, the Superior Court made the same mistake.

Instead, the Superior Court should have examined whether the rescission provision provided members a genuine opportunity to challenge the Transaction, which was a fundamental merger seeking to eliminate IDPF altogether. Under the Superior Court's ruling, a nonprofit has the power to divest its members of the right to seek judicial review by including *any* bylaw provision—however illusory or inequitable—that could be construed as "a means of resolving a challenge to a corporate action." Neither Congress nor the Council could have intended to grant nonprofit boards such sweeping authority to deprive members of their right to judicial review. This is especially so here where IDPF's board misrepresented several material aspects of the Transaction and willfully undermined OverDrive's efforts to challenge it by the means prescribed in the Bylaws.

IDPF argues that subsection "(c)'s 'circumscription'—or partial abolition—of the cause of action created by subsection (a) . . . served as the basis for IDPF's

successful motion for summary judgment." (Appellee's Br. at 33.) But subsection (c) only circumscribes a cause of action under subsection (a) *if* the articles or bylaws provide "a means of resolving a challenge to a corporate action." A bylaw provision that, in law or in fact, fails to provide members a meaningful opportunity to challenge corporate action cannot satisfy subsection (c). As the undisputed material facts show, IDPF thwarted any opportunity OverDrive may have had to challenge the Transaction.

IDPF's Bylaws cannot qualify as the exclusive "means of resolving a challenge to a corporate action" contemplated by Section 29-401.22(c) for three reasons:

First, the Plan IDPF communicated to the membership never mentioned this putative "means of resolving a challenge." To qualify as a genuine "means of resolving a challenge"—especially for the type of fundamental transaction at issue here—IDPF should have disclosed this bylaw provision to the membership. This is particularly true here because IDPF is now attempting to rely on this provision to divest OverDrive of its right to seek judicial review.

Second, Bylaw Article III, Section 1 is permissive and provides that "[a]ny action by the Board of Directors *may* be rescinded by a simple majority of a quorum of Members . . . ." (Appellee's Br. Fact ¶ 4 (emphasis added).) Nothing in this Bylaw says that it is the exclusive means of resolving a challenge to corporate action.

The Bylaw's permissive nature allowed OverDrive to alternatively exercise its express statutory right under Section 29-401.22(a) to seek judicial review of the corporate action. The Superior Court's ruling deprived OverDrive of that right.

Third, it is undisputed that IDPF interfered with OverDrive's efforts to contact IDPF's membership, which necessarily precluded OverDrive from raising a petition requesting a vote from Primary Representatives of Members "in a number equal to the Directors" under the Bylaws. IDPF's willful interference with OverDrive's efforts to exercise the Bylaws' rescission provision disqualifies IDPF from relying on Section 29-401.22(c).

For these reasons, Section 29-401.22(c) does not circumscribe OverDrive's right to challenge the Transaction under subsection (a). The Superior Court should have acknowledged the board's many misrepresentations and held that, in this instance, the Bylaws did not provide a "means of resolving a challenge to a corporate action." The Superior Court erred by holding otherwise, and nothing in IDPF's Brief supports application of Section 29-401.22(c) to divest OverDrive of its express statutory right to seek judicial review of the Transaction.[1]

[1] Moreover, the courts have not hesitated to intervene in the operation of nonprofit organizations, including in situations like this where property interests are implicated (of which copyright is one). *See, e.g.*, *Levant v. Whitley*, 755 A.2d 1036, 1044 n.11 (D.C. 2000) (holding that judicial intervention is appropriate in cases pertaining to an unincorporated private voluntary membership association "where property rights or a pecuniary interest is at stake.").

IV. THE REMAINDER OF IDPF'S ARGUMENTS HAVE NO MERIT

A. The "Business Judgment Rule" Does Not Apply

The "business judgment rule" does not shield IDPF from judicial review of the flawed MIT/W3C Transaction. (Appellee's Br at 36.) IDPF identifies no authority applying the business judgment rule to claims under D.C. Code Section 29-401.22 or to the equitable grounds alleged in OverDrive's Amended Petition. OverDrive has similarly uncovered no such authority. There are compelling reasons, moreover, why the business judgment rule cannot apply in this case.

The "business judgment rule" is a standard of review "that guides the court's determination of whether" a board's fiduciary "duties have been violated . . . , which directs the court to presume the board of directors 'acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company.'" *Larkin v. Shah*, No. CV 10918-VCS, 2016 WL 4485447, at *8 (Del. Ch. Aug. 25, 2016) (quotation omitted).

The business judgment rule is inapplicable here for four reasons:

First, OverDrive does not seek monetary damages from IDPF or to impose personal liability on any of its directors or officers.[2] Instead, OverDrive's five claims seek injunctive, declaratory, and other ancillary relief like an order requiring IDPF to

[2] OverDrive expressly reserves the right to pursue claims against IDPF's former directors, who have completely abdicated their responsibilities to the organization and its members, and nothing herein shall be construed as a waiver of that right.

have a special meeting of its former members. It is, therefore, unclear how the business judgment rule—even if it applied—would exculpate IDPF from the misconduct alleged in OverDrive's Amended Petition.

Second, IDPF cannot invoke the business judgment rule to insulate itself because OverDrive has presented facts demonstrating that "the directors are interested or lack independence relative to the decision, d[id] not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available." *Behradrezaee v. Dashtara*, 910 A.2d 349, 361 (D.C. 2006). For example, the directors rushed the Transaction through (Fact ¶ 53); had conflicts of interest (*id.* ¶ 66); did not consider alternatives (*id.* ¶ 132); and decided that MIT/W3C—which it once viewed as an existential threat to EPUB—was the only logical choice to take over development of EPUB. (*Id.* ¶ 122.)

Third, the authority cited by IDPF—*Armenian Assembly of America, Incorporated v. Cafesjian*, 772 F. Supp. 2d 20 (D.D.C. 2011) (Appellee's Br. at 36)—actually supports OverDrive's position because it holds that, (1) the business judgment rule does not provide absolute protection for a board, and (2) it cannot apply to the Transaction because Mr. McCoy had a personal interest in it. "It is, in short, black-letter, settled law that when a corporate director or officer has an interest in a decision, the business judgment rule does not apply." *Id.*, 772 F. Supp. 2d at

104 (quotation marks omitted). Moreover, each of IDPF's former directors received an important position on MIT/W3C's Steering Committee for the Publishing Business Group, as IDPF mentioned at least five times in its Brief. (Appellee's Br. at 16, n.4, 23, 28, 39, 42.) Indeed, the entire Steering Committee for MIT/W3C's Publishing Business Group was initially composed of IDPF's former board members (*see* Appellee's Br. at 28), demonstrating that IDPF was not "substantially similar" to MIT/W3C at the time the parties consummated the Transaction. (*See infra* Section IV.B.)

Fourth, it is also impossible to square the business judgment rule with the plain language of Section 29-401.22(a). That Section, which has no analog in the for-profit law, provides that "[u]pon petition of a person whose status as, or whose rights or duties as, a member, delegate, director, member of a designated body, or officer of a corporation are or may be affected by any corporate action, the Superior Court may hear and determine the validity of the corporate action." D.C. CODE § 29-401.22(a). The Code does not presume that a board "acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company." *Larkin*, 2016 WL 4485447, at *8. The two concepts arise from different circumstances (*i.e.*, nonprofit vs. for-profit) and make little sense when applied together. If Congress or the Council had intended to codify the business judgment rule they would have done so. *Cf. F.D.I.C. v. Faigin*, No. CV 12-03448

DDP, 2013 WL 3389490, at *5 (C.D. Cal. July 8, 2013) (discussing California Corporations Code § 309 that codifies California's business judgment rule).

In summary, IDPF's reliance on the business judgment rule to evade judicial review of its misconduct in completing the Transaction is misplaced. There is no statute or case law suggesting that the rule applies to the claims in this case. Regardless of how this case is analyzed, IDPF is wrong to rely on the business judgment rule to avoid responsibility for its misdeeds.

B. MIT/W3C Is In No Way "Substantially Similar" to IDPF

The Superior Court erred in finding that IDPF may "merge with a larger corporation that engages in numerous activities as long as at least one of those activities is substantially similar to those of IDPF" (Omnibus Order at 15), and IDPF relies on that ruling. (Appellee's Br. at 35.) Saying MIT/W3C is substantially similar to IDPF is like saying an online "everything" store is substantially similar to a nonprofit library. They both deal in books, but the former has primarily commercial interests in mind—reaching far beyond books—while the latter is devoted to reading, education, and preserving the book as an independent medium of exchange.

Far from being "substantially similar," a monolithic organization seeking to monetize books as one of many commercial pursuits is directly at odds with an organization devoted solely to preserving their sanctity. MIT/W3C's status as a

"larger corporation that engages in numerous activities" is precisely why IDPF's Articles contain the "substantially similar" requirement: in the rush to grow the internet and promote all manner of digital media, MIT/W3C's work risks crowding out books entirely. By allowing books to forever fade into the oblivion that is the internet, the Superior Court's ruling does what IDPF has dedicated its whole existence to preventing.

Further, before the Transaction, MIT/W3C did not even have a working group devoted solely to electronic books. Indeed, IDPF had to include an amendment in its Plan to expand its stated mission to the broader notion of "digital publications." MIT/W3C's lack of a working group devoted to the future of electronic books is evidenced by the fact that "the Steering Committee of the Publishing Business Group" was to "initially . . . consist of IDPF's Board." (Appellant's Br. at 16, n.4, 23, 28, 40, 42.) Simply transplanting IDPF's board into MIT/W3C's vast and unrelated organizational structure does not *ipso facto* make MIT/W3C "substantially similar" to IDPF.

V. CONCLUSION

For the foregoing reasons, and for the reasons stated in Brief of Petitioner-Appellant OverDrive, Inc., OverDrive respectfully requests that this Court reverse the Omnibus Order and the Judgment Order and order the Superior Court to enter summary judgment in favor of OverDrive.

Dated: May 24, 2021

Respectfully submitted,

/s/ Andrew G. Fiorella

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, a copy of the foregoing Reply in Support of Brief of Petitioner-Appellant OverDrive, Inc. was filed electronically through the Court's authorized eFiling system pursuant to Rule 5(e). Notice of this filing will be sent by operation of the Court's electronic eFiling system. Pursuant to Rule 5(b)(2)(D), a copy of the filing was served on the following by electronic means:

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